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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

DOUGLAS MOORE, O'NEIL BRADFORD,

Petitioner(s)

vs.

TIME WARNER, INC., ET AL,

Respondent(s).

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Douglas Moore, pro se
O'Neil Bradford, pro se
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31 pp

QUESTION(S) PRESENTED

No. 95-2256

1. Under Title 17 U.S.C. was the district court erred by allowing Atlantic to proceed with defending this copyright infringement action without copyright registrations on file at the copyright office in Washington D.C. for the United States of America?

2. In the judgment in this action Moore v. Atlantic entered on August 2, 1996 in favor of Atlantic. If Brown report was not signed under penalty of perjury then the district court erred by not allowing plaintiff/petitioner the time to amend his Opposition to Atlantic's Summary Judgment Motion by obtaining music expert Dennis Brown's signature under penalty of perjury especially in the presence of conflicting expert testimony pursuant to F.R.C.P. 702 before entering judgment?

3. In respect to the judgment entered on August 2, 1996 regarding the existence of plaintiffs sheet music [on page 4 at line 12]. In order for music expert Brown to complete his analysis of plaintiffs works verses defendants work(s) he had to review the sheet music to plaintiffs work(s). And if plaintiff/petitioner verbally expressed to the presiding Judge that plaintiffs own sheet music to their work(s) at the settlement conference held in his chambers on October 25, 1995; therefore was the district court erred by ruling no sheet music exist on plaintiffs works?

4. After reviewing the order in Douglas Moore v. Atlantic Recording Corporation, U.S.D.C. Case No. 95-2256 Judge John G. Davies entered on August 2, 1996. Is there a

genuine issue for trial regarding substantial similarity between the works and was the district court erred by dismissing this action without the need for trial because I plaintiff Moore complied with F.R.C.P. 702 in my opposition by providing expert testimony satisfying this rule in this civil action.

No. 96-56337

5. Under Title 17 U.S.C. if Atlantic has no copyright registration with regard to said work(s) at issue herein on file at the copyright office in Washington D.C. Was the court of appeal erred by allowing Atlantic to proceed on appeal without copyright registrations on file in respect to the two (2) works in question herein entitled "I wanna be down" and "baby?"

6. Did the district court and court of appeal properly exclude Mr. Brown's analysis on the grounds that it was not signed under penalty of perjury although the music analysis was signed by Mr. Brown?

7. If the sheet music and music analysis were provided by Moore on appeal was the court of appeal erred by excluding the sheet music and music analysis submitted by Moore on appeal from two (2) additional music experts signed under penalty of perjury in which concur with Mr. Brown's findings?

LASC No. BC 154 147

8. Under California Civil Procedures CCP 413.10(b), 413.40, 414.10, 415.30 and 415.40 proof of service was proper on all of the named defendants before removal of action, and removal of the state claims were improvident under 28 U.S.C. s 1441(c), s 1443, s 1446(a)(b), s 1447(e)

and eleventh amendment of the United States Constitution. And in a dual court system where state trial courts generally have original jurisdiction on state claims and most claims arising under federal law.[Restricted jurisdiction of legislative courts consistently enforced by United States Supreme Court] Does it take an act of Congress to deny state courts jurisdiction over particular, federal law based claims or causes of action? See, e.g. Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50, 76-77, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982); Chicago, Rock Island & Pac Ry. V. Martin, 178 U.S. 245, 248, 20 S. Ct. 854, 44 L. ed. 1055(1900).

No. 96-5877

9. Under the doctrines of res judicata and collaterel Estoppel was the district court erred under 28 U.S.C. s 1441(c) by not permitting remand of all matters in which state law predominates and precluded Bradford from litigating the state claims in federal court?

10. Under 28 U.S.C. s 1441 was removal proper by Atlantic, and joinder by EMI, and Koppelman effective?

11. In the district court order entered in Bradford v. Time Warner, Inc., et al., on November 4, 1996 were Bradford's rights violated by the court in respect to the copyright infringement claim in Moore v. Atlantic entered on August 2, 1996 when Moore proceeded pro se and Bradford was terminated from said action on April 4, 1995; subsequently the Moore v. Atlantic action was filed on April 7, 1995 by Moore only; however Bradford was added to the final opinion by the district court?

12. If Moore case was filed under the claim of copyright infringement only on April 7, 1995 and Bradford case was filed in state court on July 22, 1996 cited copyright

infringement and five (5) additional state claims doesn't the district court orders entered on August 2, 1996 and November 4, 1996 conflict?

No. 96-56748

13. Under 28 U.S.C. 1447(c), on appeal did the court of appeal erred in it's ruling entered on December 19, 1997 and March 27,1998 in Bradford v. Time Warner, Inc., et al. by failing to remand the state claims to the district court to be litigated to final judgment where state trial courts generally have original jurisdiction of claims or causes arising under federal law; see also U.S. Cont., Art VI cl. 2 (judges of every state are bonded by Constitution and laws of United States)?

14. On appeal were Bradford's rights violated by the court when it rule on this case without oral argument?

15. On appeal were Bradford's rights violated by the district court and court of appeal when it rule on this case after Bradford brought to the court's attention that the transcripts for the Motion to Dismiss in this action were edited and reworded by the court reporter before mailing them to Bradford in which were submitted to the court of appeal as the official record?

LIST OF PARTIES

All parties do not appear in the caption of the case(s) on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition as follows:

Time Warner, Inc., Time Warner, Entertainment, Warner Communications, Inc., Warner Chappell Music Corp.,

Warner Tamerlane Music Corp., Warner Bros Publications, Inc., WEA Distribution, Inc., WEA Int'l, Atlantic Recording Corp., Atlantic Records, Atlantic Group, Elektra East West Group, Gerald Levin, Robert Daly, Terry Semel. Les Bider, Michael Fuchs, Ahmet Ertegun, Doug Morris, Val Azzoli, Sylvia Rhone, Darryl Williams, Montie L. Bailey, Alysia Young, Ilene M. Goldberg, Jeffrey L. Graubart, Judie Castano, Carol King, Darlene Wilson, DJ Terence Toy, BMG Dist., Inc., Columbia House, EMI Music Publ., Inc., EMI-Chrysalis Music Corp., Charles Koppelman, [Kevin Jones aka Kipper Jones aka Booker T. Jones III dba Human Rhythm Music, Young Legends Songs, Pecot Music], Keith Crouch, ["Funky" Jimmy Blue aka Eddie Towns, Jr dba 17 Demo Studio, Nu Soul Music, Nu Soul Habits], Rashaan Patterson dba Ecstasoul Music, [Michael McDavid, John Kuvalic dba Groovilicious Music], Brandy Norwood dba Brand Nu, Inc., and Does 1-64, Inclusive Defendant(s.

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Petitioner(s), Moore and Bradford, individuals, respectfully prays that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit and judgment(s) below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A and B to the petition and is unpublished. The decisions of the Ninth Circuit Court of Appeals are docketed as Civil Actions No. 96-56337 and 96-56748.

The opinion of the United States district court in Bradford v. Time Warner, Inc., et al., and is unpublished and is docketed as Civil Action No. 96-5877 JGD(BQRx).

The opinion of the United States district court in Moore v. Atlantic Recording Corporation, and is unpublished and is docketed as Civil Action No. 95-2256 JGD(BQRx).

The opinion and orders of the state court appears at Appendix C to the petition and is unpublished and is docketed as Civil Action No. BC 154 147.

The opinion of the highest state court of appeal to review the merits appears at Appendix D to the petition and is unpublished and is docketed as Civil Action No. B111011.

JURISDICTION

The date on which the United States Court of Appeals decided on our case(s) was a timely petition for rehearing en banc and denied by the United States Court of Appeals on the following date: March 27, 1998, the opinion denying rehearing appears at Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. s 1254(1). For case(s) from state courts jurisdiction of this Court is invoked under 28 U.S.C. s 1257(a).

STATUTORY PROVISIONS INVOLVED

In Moore v. Atlantic No. 95-2256 pursuant to (Title 17, U.S. Code) governing Atlantic's ownership in respect to the works entitled " I wanna be down " and " Baby " no copyright registrations are on file at the copyright office in Washington D.C. to establish Atlantic's copyrights or the right granted to Atlantic by the district court to proceed in a Court of law under Title 17 U.S. Code 508 defending those alleged rights.

In Moore's opposition to Atlantic's summary judgment motion, I provided expert testimony pursuant to FRCP Rule 702 regarding "experts" and "testimony" substantiating my contentions that the works at issue are substantially similar satisfying the "entrinsic" test as provided by this Court in Sid & Marty Knofft Television Productions, Inc. v. McDonald's Corporation, 562 F. 2d 1157 (9th Cir. 1977), and Dennis Brown's report was sign by Mr. Brown. Remand is required.

Additionally, pursuant to FRAP 10b-2 and FRCP Rule 702 and in the presence of conflicting expert testimony the court of appeals was required to admit and consider the sheet music and music expert analysis presented by plaintiff/petitioner Moore on appeal.

BC 154 147

In Bradford v. Time Warner, Inc., et al., LASC Case No. BC 154 147 removal of action on causes of action pursuant to 28 U.S. Code s 1447(e) and s 1447(c), and the United States Constitution, Art. VI cl. 2, and Eleventh Amendment was improper on behalf of defendants-respondents, Atlantic, EMI, and Koppelman. And under California Civil Procedures service of the summons and complaint were properly served on several of the forty-one named defendants in this action. Remand of the state claims are required under 28 U.S. Code 1447(c), (e) and the United States Constitution.

CONCISE STATEMENT OF THE CASE

The instant action entitled Douglas Moore v. Atlantic Recording Corporation was filed April 7, 1995 under the claim of copyright infringement only. Atlantic subsequently brought Summary Judgment with regard to the lack of substantial similarity between the works conceding plaintiffs ownership and Atlantic's access to plaintiffs works. The district court rule in favor of Atlantic and found plaintiffs music expert report not admissible for not being signed under penalty of perjury. Moore appealed. The instant action entitled O'Neil Bradford v. Time Warner, Inc., et al., was filed July 22, 1996 under six (6) different causes of action including copyright infringement against forty named defendants. Defendants Atlantic, EMI, and Koppelman improperly removed this action to the district court and

subsequently brought a motion to dismiss on the grounds of claim preclusion and issue preclusion. The district court dismiss the complaint in it's entirety without litigating the state claims to final judgment. Bradford appealed.

On appeal Bradford and Moore appeals were consolidated and on December 19, 1997 the court of appeals for the Ninth Circuit before Circuit Judges Sneed, Leavy, and Trott the Court affirmed lower court ruling. Finding plaintiffs sheet music and expert music analysis inadmissible in the presence of conflicting expert testimony.

Moore and Bradford subsequently Petition for Rehearing En Banc however was denied by Court of Appeals on March 27, 1998. Moore and Bradford's Petition for Writ of Certiorari enclosed and is timely.

REASON FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO ENSURE PROPER ENFORCEMENT OF JURISDICTIONAL ISSUES IN DUAL COURT SYSTEM UNDER 28 U.S. CODE s 1441(C) REGARDING PROCEDURAL REMOVAL OF SEPARATE AND INDEPENDENT CLAIMS AND THE REQUIREMENT OF ABSOLUTE DIVERSITY.

Remand of all matters in which state law predominates also should simplify administration of the separate and independent claim removal. The federal and state claims must be so related in such a way as to establish pendant jurisdiction over the state claim(s). In general, all defendants must join in removal under 28 U.S. Code s

1446(b); see Chicago, Rock Island & Pac. Ry. V. Martin, 178 U.S. 245, 248, 20 S. Ct . 854, 44 L. ed. 1055 (1900).

The right of removal jointly held by all defendants. Hewitt v. City of Stanton, 798 F. 2d 1230, 1232-1233 (9th Cir. 1986). Some courts require improperly served defendants to join. See Teitelbaum v. Soloski, 843 F. Supp. 614, 615 (C.D. Cal. 1994); parties to supplemental claims must join because jurisdiction is based on single case. Chicago, Rock Island & Pac. Ry. V. Martin, 178 U.S. 245, 247, 20 S. Ct. 854, 44 L. Ed. 1055 (1900). Defendants seeking removal bears burden of proving federal jurisdiction. Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97, 42 S. Ct. 35, 66 L. Ed. 144 (1921).

In cases involving improvident removal under 28 U.S.C. 1447(d) and civil rule 11 notice of removal must be signed by all defendants. Remand is required.

II.

THIS COURT SHOULD GRANT CERTIORARI TO INSTRUCT LOWER COURTS ON HOW TO PROPERLY APPLY 17 508 U.S. CODE IN A COPYRIGHT INFRINGEMENT ACTION REGARDING OWNERSHIP AND IMPROPER COPYRIGHT REGISTRATION OF SAID WORKS.

In these actions, and pursuant to 17 508 U.S.C. the district court has disregarded this law which would have established Atlantic's and Time Warner's right to copy the herein works which were distributed and sold to the public, and would relieve the Courts of these types of actions in

which the defendants do not posses copyright registrations on said works. Additionally, under 17 508 USC would require defendants to posses copyright registrations on file at the library of Congress before proceeding to defend actions in a United States Court of law involving copyright infringement.

III.

THIS COURT SHOULD GRANT CERTIORARI TO INSTRUCT LOWER COURTS ON HOW TO PROPERLY APPLY THE "ENTRINSIC" TEST REGARDING ACTIONS IN WHICH EXPERT TESTIMONY WAS PROVIDED IN OPPOSITION TO SUMMARY JUDGMENT MOTION REGARDING SUBSTANTIAL SIMILARITY AND SIGNED BY EXPERT. HOWEVER, PRO SE PLAINTIFF-PETITIONER DID NOT INSTRUCT EXPERT TO INCLUDE THE PHRASE " I DECLARE UNDER PENALTY OF PERJURY" PRIOR TO SIGNING HIS REPORT.

Amended and additional pleadings could have been requested by the court and provided by pro se plaintiff to correct the deficiency with plaintiffs expert analysis submitted in Moore v. Atlantic which determined the works at issue are the same, and substantially similar.

Pursuant to the "Extrinsic" test under FRCP Rule 702, the opinion of the district court should be considered an abuse of discretion, and rush to judgment in the presence of conflicting expert testimony. The district court entered judgment in the presence of conflicting expert testimony and if further testimony could have been obtained by the presiding magistrate judge Brian Q. Robbins through a sworn deposition of music expert Dennis Brown, Brown testimony would have been eventually sworn in by the court and defendants.

The district court did not properly apply the "extrinsic" test in this action and this Court should review the opinion of the lower Court to set a precedence regarding pro se plaintiffs and verified pleadings submitted with a simple correctable deficiency as it relates to the application of the "extrinsic" test., see, Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corporation, 562 F 2d 1157 (9th Cir. 1977).

CONCLUSION

Pursuant to 28 U.S.C. s 1441(c) certiorari should be granted: 1/ to ensure proper enforcement of jurisdictional issues in a dual court system regarding procedural removal of separate and independent claims and the requirement of absolute diversity, 2/ to instruct lower courts on how to properly apply title 17 508 U.S.C. in actions involving copyright infringement and said ownership regarding improper copyright registration of defendants works, 3/ to instruct lower courts on how to properly apply the "extrinsic" test regarding actions in which expert testimony was provided by pro se plaintiff however pursuant to Rule 10 of the US Supreme Court governing review of Certiorari on the within appeals that the lower courts opinions are misstated, tainted, and conflict as to call for an exercise of the Court's supervisory power.

The petition for writ of certiorari is extremely warranted to instruct proper application of said laws and to preserve the US Constitution [Eleventh Amendment, and U.S. Cont., Art. VI cl. 2]and laws and procedures referenced herein above. The petition for writ of Certiorari should be granted.

Appendix A – ORDER OF THE UNITED STATES COURTS OF APPEALS FOR THE NINTH CIRCUIT FILED MARCH 27, 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-56337
No. 96-56748

Douglas Moore, O'Neil Bradford,

Plaintiffs-Appellees,

Verses

Time Warner, Inc, et al.,

Defendants-Appellants.

ORDER

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

/s/ Cathy A. Catterson
Clerk

Appendix B – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DECIDED DECEMBER 19, 1997

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

By John G. Davies, District Judge
Brian Q. Robbins, Magistrate Judge

No. 95-2256
No. 96-56337

No. 96-5877
No. 96-56748

Decided without oral argument
Decided: December 19, 1997

Douglas Moore, O'Neil Bradford,
Plaintiffs-Appellants

v.

Time Warner, Inc., et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California

Before: SNEED, LEAVY, and TROTT, Circuit Judges

Appendix B

Affirmed by non-published opinion no specification as to which circuit judge wrote the opinion or what judges joined.

MEMORANDUM OPINION

In these two consolidated appeals, Douglas Moore appeals pro se from the district court's grant of summary judgment in favor of Atlantic Recording Corporation ("Atlantic Records") in Moore's action for copyright infringement. O'Neil Bradford appeals pro se from the district court's dismissal of his complaint based on copyright infringement and additional state law claims. We review the district courts grant of summary judgment and Fed. R. Civ. P. 12(b)(6) dismissal de novo.See, Bagdadi v. Nazar, 84 F. 3d 1194, 1997 (9th Cir. 1996) (summary judgment); Stone v. Travelers Corp., 58 F. 3d 434, 436-37 (9th Cir. 1995) (dismissal). We have jurisdiction pursuant to 28 U.S.C. s 1291, and we affirm.

Appendix B

I.

Douglas Moore, is (50%) fifty percent owner of the copyrights at issue and proceded pro se in the instant action alone. In Moore opposition contained expert music report performed by Dennis Brown pursuant to FRCP Rule 702 substantiating substantial similarity between the four (4) works at issue presenting a genuine issue for trial.

Copyright Infringment

To establish a successful claim of copyright infringement the plaintiffs must prove (1) ownership of the copyright, and "copying" of protectable expression by the defendant(s), Baxter v. MCA, Inc., 812 F. 2d 421, 423 (9th Cir. 1987). (2) Defendants access to the copyrighted work prior to the creation of defendants' work, and (3) substantial similarity between the copyrighted work and the defendant's work.

For purposes of this motion Atlantic concedes plaintiffs' ownership interest in the copyrights at issue, (Atlantic had access to plaintiffs copyrighted works prior to the creation of the works "I wanna be down" and "baby.) Atlantic argues, however, that summary judgment must be entered in it's favor because it's works are not substantially similar to the plaintiffs works. Moore disagreed and rebutted Atlantic's suggestions with Brown report which contain musical notes and analysis conflicting with Atlantic's expert D. Anthony Ricigliano which qualifies this action suitable for trial to present the genuine material facts before the jury of ordinary reasonable persons, satisfying the requirements with regard to the "intrinsic" test, which is applied to

determine whether two works are substantially similar in their form of expression.

The issues with Atlantic's summary judgment does not only surround the issue of substantial similarity, however, the courts blatant disregard of the law pursuant to 17 508 U.S.C. in respect to the non-copyrighted titles recorded and distributed by the defendants entitled " I wanna be down" and baby."

Why did the lower Court and Court of Appeals for the Ninth Circuit overlook Atlantic's ownership of said works and their absence of copyright registrations. The defendants must set forth specific facts showing how and where the defendants obtain those rights and present them to the trial court before proceeding to defend those rights. The lower Courts have erred in it's obligation under the law (17 508 U.S.C.).

Moore also provided additional sworn testimony on appeal before circuit judges Sneed, Trott, and Leavy pursuant to FRAP 10(b)(2) also concurring with Brown report submitted in plaintiffs opposition before US District Court Judge John G. Davies substantiating a genuine issue of material facts suitable for trial. However, the circuit judges rejected Brown testimony, along with Sanders and Wherli sworn testimony.

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1. The district court properly excluded Mr. Brown's music analysis on the grounds that it was not signed under penalty of perjury. See, Fed. R. Civ. P 56(e); 28 U.S.C. s 1746; Celotex Corp. v. Catrett, 477 U.S. 317, 321 n.3 (1986).

Appendix B

At the motion hearing at issue on May 13, 1996, if the Court review the transcripts you will find the presiding Judge completely leading the defense counsels argument showing bias and prejudice, and you will also find attorney Dana S. Milmeister's statements as to the creation of the "music" which she alleges is the sole creation of defendant Keith Crouch. However, the defendants fraudulent copyright registrations # PA 757-401 and # PA 757-402 plainly list "words and music by" Keith Crouch, Kipper Jones, and Rashaan Patterson. These registrations are with conscious knowledge deceitful and appear to be fraudulent.

THE COURT: Let me ask counsel one further question only.

Atlantic concedes access?

MS. MILMEISTER: For purpose of this motion, yes, your Honor.

THE COURT: And there were two composers, right. The Atlantic works?

MS. MILMEISTER: Actually, there was one composer of the music, which is Keith Crouch. The other writers of the songs were lyricists.

THE COURT: And did Crouch have access to the plaintiff's works? You don't seem to cover that point in your opposition.

MS. MILMEISTER: Well, for purposes of this motion, access --

Appendix B

THE COURT: Well, let's assume you're in trial and he's called as a witness and Mr. Moore asks him the right questions that relate to access. What would his answer be?

MS. MILMEISTER: Your Honor, Atlantic believes that the testimony of Mr. Crouch truly would be that he never heard from the –

THE COURT: The composer had never – there is evidence then that the composer of the music had never heard of or heard the demos that were submitted by Mr. Moore?

MS. MILMEISTER: That's correct, your Honor.

THE COURT: What about the lyricists?

MS. MILMEISTER: The lyricist –

THE COURT: Same thing?

MS. MILMEISTER: Yes.

THE COURT: And they were submitted to Atlantic, but the people who wrote the two works that claimed infringing works personally had no access?

MS. MILMEISTER: That is correct.

THE COURT: Have you taken any depositions, Mr. Moore? Is that correct? Is that what they tell you? Did you ask them in depositions?

Appendix B

MR. MOORE: I wasn't able to depose those witnesses.

THE COURT: I see.

MR. MOORE: But I beg to differ with the defendant's counsel, and I 'm contending that one of the executives at Atlantic Records is a personal manager to Keith Crouch and has a personal link to the composition that was sent in.

II.

O'Neil Bradford, is (50%) fifty percent owner of the copyrights at issue and did not proceed in Moore v. Atlantic, and on April 4, 1995 was terminated by the United States Magistrate Judge. The district court in conjunction with the defense counsel has totally misrepresented Bradford's participation along with presenting false statements of his participation at said court hearings on the record. Plaintiff Bradford's proof is the opinion in Moore v. Atlantic and the transcripts of said hearings.

On July 22, 1996, Bradford filed an instant action against forty-one defendants citing (1) copyright infringement, (2) civil conspiracy, (3) fraud, (4) unfair competition, (5) intentional interference with prospective economic advantage, and negligent interference with prospective economic advantage; case entitled: O'Neil Bradford v. Time Warner, Inc., et al., Case No. BC 154 147, Los Angeles Superior Court for the County of Los Angeles.

Appendix B

Defendant Atlantic, noticed removal of action pursuant to 28 U.S.C. s 1446(a), [U.S.D.C. Case No. 96-5877 JGD(BQRx)], and EMI and Koppelman joined then subsequently brought a motion to dismiss on the grounds of collateral estoppel and res judicata in respect to claim preclusion and issue preclusion. The district court dismissed Bradford's action in it's entirety with prejudice including the non-litigated state claims.

Bradford argued on appeal that he was never a plaintiff in Moore v. Atlantic and besides that action is only based on the claim of copyright infringement. Claim preclusion does not apply to any of the state claims filed in Bradford v. Time Warner, Inc., et al.; and removal of the case was improper under 28 U.S.C. s 1446(b), See, Chicago, Rock Island & Pac Ry. V. Martin, 175 U.S. 243, 248, 20 S. Ct. 854 44L Ed. 1055 (1900); Nishimoto v. Federman-Bachrach & Assocs., 903 F. 2d 709, 712 n.3 (9th Cir. 1990)(Strong presumption against removal jurisdiction means defendant always has burden of establishing removal proper); Emrich v. Touche Ross & Co., 846 F. 2d 1190, 1195(9th Cir. 1988.)

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2. On appeal, Moore has submitted various documents including copies of sheet music and two (2) additional music analysis pursuant to FRAP 10(b)(2) and FRCP 702. Because these documents were not presented to the district court we have not considered them for purposes of this appeal. See, Fed. R. App. Proc. 10(a); United States v. Elias, 921 F. 2d 870, 874 (9th Cir. 1990). The district court's judgment is therefore affirmed.

Appendix B

The district court order entered November 4, 1996 falsely states the Moore v. Atlantic file date as May 3, 1995, order at 2:17. And the order list the magistrate judge as (BQRx), order at 2:6. However, the district court order entered on August 2, 1996 cover page at 1:10 list the magistrate judge as (RNBx). Pursuant to Rule 10 of the Rules of the US Supreme Court governing review of certiorari the lower court rulings are misstated and conflict as to call for an exercise of the Court's supervisory power. The petition for writ of certiorari should be granted.

Appendix C – OPINION AND ORDERS OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATED MARCH 4, 1997

CIVIL ACTION

NUMBER BC 154 147

By Aurelio Munoz

O'Neil Bradford,

Plaintiff,

v.

Time Warner, Inc., et al.,

Defendants.

ORDER

The Motion is granted. Once the matter was removed to the Federal Court, the Federal Court took jurisdiction of all the parties and all causes of action. Plaintiffs remedies, if any, have to be litigated in the Federal Court. ALLSTATE INS. CO. v. SUPERIOR COURT (1982) 132 CA 3d 670, further status conference is placed off calendar.

Appendix C

Nature of Proceeding:

MOTION OF DEFENDANT ATLANTIC RECORDING CORPORATION, DEFENDANTS ATLANTIC RECORDING CORPORATION, EMI MUSIC PUBLISHING, INC., AND CHARLES KOPPELMANS' TO DISMISS COMPLAINT.

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3. No final judgment of appealable order of dismissal in the form of a written order signed by the court and filed in this action until August 20, 1997. (Code Civ. Proc., s 581d.)

APPENDIX D – ORDER OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT – DIVISION SEVEN.

DECIDED NOV 19, 1997

NOT PUBLISHED

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

No. B111011

(Superior Ct. No. BC 154 147)

O'Neil Bradford,

Plaintiff-Appellant,

v.

Time Warner, Inc., et al.,

Defendants and Respondents.

Appeal from order of the Superior Court of Los Angeles County. Aurelio Munoz, Judge. Affirmed.

Appendix D

Affirmed by non-published opinion. Judge J. Woods wrote the opinion, in which Johnson, Acting P.J. and Judge J. Neal joined.

OPINION

Woods, Judge:

Appellant invites this court to determine whether certain defendant's other than respondents were properly served and whether removal to the Federal court was improvident and then stay the action against respondents and remand the entire matter to state court.

Federal court, which in turn had dismissed the action without remanding it to state court.

The court reasoned: "One of the controlling federal statutes establishes that removal of a civil action from state court to a federal court ..... operates as a literal 'removal' of the action from the state court and terminates that court's jurisdiction to proceed in it at the time. [28 U.S.C. s 1446(a),(d),(e).] A companion federal statute makes clear that proceedings in the action may thereupon be conducted in the federal court, which has exclusive jurisdiction after removal; that the federal court must 'remand' the action to the state court may resume it's first instance jurisdiction if – but only – there is or a 'remand' of the action to it from the federal court. [28 U.S,C. s 1447, (a) and (c).]"

Appendix D

The Court of Appeal determined that without a remand, there was no action in which the superior court could resume jurisdiction so consequently the superior court was without jurisdiction to proceed further.

Similarly, appellant's action was removed to federal court, which in turn dismissed the action without remanding it to the superior court. Any arguments appellant had about the propriety of remand had to be raised in federal court. (28 U.S.C. s 1447, (c).) State courts have no authority to stay federal actions or order federal actions remanded to state courts. Accordingly, as the superior court in this case had no jurisdiction of appellant's action, it's dismissal was proper. The order is affirmed.

I.

Pursuant to C.C.P. 413.10(b), 413.40, 414.10, 415.30, and 415.40 governing service of the summons and complaint in a civil action, several of the named defendants in this instant action were properly served and never responded to the summons and complaint, or joined into Atlantic's motion to dismiss. Subsequently, Bradford made two (2) attempts before final judgment to file defaults on those defendants, however, rejected by the Clerk of the Superior Court and returned by US Mail addressed to plaintiff-appellant O'Neil Bradford under discrepancy. Atlantic's notice of removal was falsely stated with regard to proper service on several of the forty-one defendants before removal.

* * *

(2)

No. 98-363

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1998

DOUGLAS MOORE, O'NEIL BRADFORD,

Petitioners,

vs.

TIME WARNER, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit correctly affirmed the District Court's rejection of petitioners' copyright infringement claims on the grounds that petitioners' songs were not substantially similar to respondent's songs.

2. Whether the Ninth Circuit correctly affirmed the District Court's dismissal of petitioner O'Neil Bradford's identical second action, on the basis of claim preclusion and collateral estoppel.

PARTIES TO THE PROCEEDINGS

Petitioners are Douglas Moore and O'Neil Bradford, both appearing *pro se*. Their petition challenges a Ninth Circuit Memorandum decision in two consolidated appeals (Nos. 96-56337 and 96-56748) affirming two summary judgments adverse to petitioners.

These consolidated cases were initiated by an action styled *Moore v. Atlantic Recording Corporation*, United States District Court, Central District of California, Case No. 95-2256 JGD ("First Action"). Both petitioners were plaintiffs in the First Action. Bradford attempted to withdraw from the First Action, but the District Court specifically found that Bradford was a plaintiff in the First Action. (App. C, 18, fn.1). Petitioners sued a number of defendants in the First Action, but served only Atlantic Recording Corporation ("Atlantic"). (App. C, 18). The First Action was resolved on the merits of the copyright claim by way of summary judgment in favor of Atlantic on July 31, 1996 (App. C), in which the District Court ruled that the matters were not substantially similar.

On July 22, 1996, petitioner O'Neil Bradford filed an action in the Superior Court of the State of California, County of Los Angeles, entitled *Bradford v. Time Warner Inc.*, Case No. BC 154 147 ("Second Action"). Although Bradford sued forty-one defendants in the Second Action, he served only Atlantic, EMI Music Publishing Inc. ("EMI"), and Charles Koppleman ("Koppleman"). (App. B, 7). On September 2, 1996, Atlantic removed the Second Action to the District Court, where it was assigned Case No. 96-5877 JGD. EMI and Koppleman, the only other parties served, joined in this removal. (App. B, 6). On October 31, 1996, the District Court granted Atlantic's motion to dismiss, in which EMI and Koppleman joined. (App. B).

Petitioners appealed to the Ninth Circuit Court of Appeals from the dismissals of the First Action and Second Action. The Ninth Circuit consolidated these appeals, and on December 19, 1997, affirmed the judgments against petitioners. (App. A). On March 27, 1998, the Ninth Circuit rejected petitioners' request for rehearing *en banc*. (App. A). On August 31, 1998, the Supreme Court docketed this petition.

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Sup. Ct. Rule 29.6, Atlantic is a corporation. Atlantic's parent corporation is Warner Communications, Inc. Warner Communications, Inc.'s parent corporation is Time Warner, Inc. Atlantic does not have any nonwholly owned subsidiaries.

Respondent EMI Entertainment World, Inc., erroneously sued as EMI Music Publ., Inc. is ultimately owned by EMI Group plc, which has issued shares to the public that are traded on the London Stock Exchange.

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STATEMENT OF THE CASE

Petitioners initially filed a copyright infringement lawsuit in federal court, which was rejected on the merits on summary judgment. Undaunted, one of the petitioners filed an identical state court lawsuit, which was removed to the District Court. The District Court dismissed the second suit on the doctrine of *res judicata* and collateral estoppel. Petitioners then appealed their two defeats to the Ninth Circuit, which affirmed the judgments against them. They also pursued an appeal in the state appellate court, which was rejected. The state appellate court held that any disputes regarding the propriety of the federal court's jurisdiction or the merits of petitioners' claims should be resolved by the federal court. Petitioners did not seek review of that decision from the state's highest court. Instead, petitioners now request that *this* Court consider claims which have been rejected by a United States District Court (twice), a federal Circuit Court of Appeal, a state trial court, and a state appellate court — although petitioners' persistence is not justified by the merits of their claims.

Petitioners' claims on the merits are simply whether Atlantic infringed copyrights owned by petitioners for two songs, "From the Heart" and "Sexxy (sic) Nights," by copying the music from these songs in two recordings, "I Wanna Be Down" and "Baby." [App. C, 18-19].

Atlantic moved for summary judgment on the basis that "I Wanna Be Down" and "Baby" were not substantially similar to "From the Heart" and "Sexxy Nights." The District Court specifically found (a finding affirmed by the Ninth Circuit) that under the extrinsic test of *Sid & Marty Krofft Television v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977), Atlantic's songs were *not* substantially similar to petitioners' works. The District Court granted Atlantic's motion to dismiss

the Second Action, finding the doctrines of res judicata and collateral estoppel "clearly applicable."

Petitioners offer no coherent reason why these specific findings should now be rejected. Accordingly, their petition should be dismissed.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS ASSERT NO COMPELLING REASONS FOR GRANTING REVIEW

Review on a petition for writ of *certiorari* is granted only for "compelling reasons." Sup. Ct. R. 10. Petitioners present no reasons whatsoever, compelling or otherwise, why the Court should grant their petition.

Ignoring the prior decisions and the posture of this case, petitioners first argue that the Court should grant review to insure "proper enforcement of jurisdictional issues." (Pet., 4). Petitioners suggest that the Second Action was improvidently removed to the district court because "all defendants" allegedly did not join in the removal of the Second Action. (Pet., 5). This point, even if true — which it is not — does not fall within one of the enumerated bases for granting review. *See*, Sup. Ct. R. 10(a), (b) and (c).

Petitioner Bradford sued *forty-one* defendants in the Second Action, yet served only three of them; Atlantic, EMI, and Koppleman. (App. B, 7). Petitioners cite no authority for the ridiculous proposition that 38 *unserved* defendants must join a Notice of Removal, to be effective — nor can they. Instead, petitioners cite *Teitelbaum v. Soloski*, 843 F. Supp. 614, 615

(D.C. Cal. 1994), a case where a defendant actually received the summons and complaint, but did not timely join in a co-defendants' removal petition. In contrast, petitioner Bradford sued, but never served thirty-eight defendants. Here, all of the defendants which were actually served with the Second Action joined in its removal. (App. B, 7). Only parties served with a lawsuit need join in its removal. *Salveson v. Western States Bankcard Association*, 731 F.2d 1423, 1429 (9th Cir. 1984). Bradford's zeal in suing unnecessary parties, but failing to serve them, should not, and does not, provide any justification for vacating the decisions of the lower courts.

In addition, petitioners did not raise their claim that the Second Action was improperly removed before either the District Court or the Circuit Court. Accordingly, they are not entitled to raise this issue for the first time before this Court. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646, 112 S. Ct. 1644, 118 L. Ed. 2d 280 (1992). Instead, petitioner Bradford opposed the motion to dismiss the Second Action on the basis that he was not a plaintiff in the First Action. (App. B, 8). The District Court properly rejected this claim.

Petitioners also intimate that they have not had *any adjudication* of the state court claims contained within the Second Action. (Pet., 4). It is hornbook law that removal of an action removes *all* claims. 28 U.S.C. § 1441(a); *Dillon v. State of Mississippi Military Dept.*, 23 F.3d 915, 918 (5th Cir. 1994). Indeed, the Second Action contained precisely the same state court claims as the First Action. (App. B, 9).

Petitioners argue that review should be granted to "instruct lower courts" regarding the ownership and registration of copyrighted materials. (Pet., 5). This is not a ground for this Court to grant review in *this* case, in which the ruling followed well-established copyright principles. There is no need for any

such instruction on these issues, especially as they relate to petitioners' claims. Indeed, the District Court granted summary judgment based upon an application of the well established "extrinsic test" to determine substantial similarity first announced in *Krofft v. McDonald's, Inc., supra*. A substantial body of copyright law has developed from the *Krofft* decision, involving hundreds of reported decisions in every Circuit. There is no reason for this Court to consider this issue anew.

Finally, petitioners argue that this Court should grant review because "the district court did not properly apply the 'extrinsic' test . . ." (Pet., 7). Not only did the District Court properly apply the correct legal standard; but this issue is precisely the type upon which the Court should *deny* review. *See* Sup. Ct. R. 10 (review is "rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.") Petitioners do not suggest that either lower court misstated the correct legal rule. Nor do petitioners suggest there is any split among the Circuits on this issue.

In sum, petitioners have not identified any of the Rule 10 considerations typically provided for granting review, and review should therefore be denied.

II.

PETITIONERS OFFER NO BASIS ON WHICH TO REVERSE THE LOWER COURTS' DECISIONS

Not only do petitioners fail to identify a compelling reason to grant review; they fail to cast any doubt on the correctness of the lower courts' decisions.

Petitioners argue they should prevail because *respondent* allegedly has not filed copyright registrations. This argument

turns the applicable legal standard upside down. To succeed on their copyright infringement claims, it is *petitioners* who must establish (1) ownership of their copyrights and (2) copying of a protectible expression. *Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir. 1987). Whether *respondent* registered its copyrights is immaterial.

Petitioners also argue that summary judgment should not have been granted against them because they submitted an unsworn letter from a purported expert witness which allegedly created a triable issue of fact. However, the federal rules of civil procedure provide that a party opposing a motion for summary judgment must submit "affidavits . . . made on personal knowledge [which], shall set forth such facts as would be admissible in evidence." Fed. Civ. Proc. R. 56(e). An opposing party can even request a continuance of a hearing in order to allow sufficient time to obtain appropriate affidavits. Fed. Civ. Proc. R. 56(f). The District Court found petitioners' "letter" to be inadmissible, another finding upheld by the Ninth Circuit. Moreover, the District Court found that even if the "letter" were admissible, "it fails to demonstrate a genuine issue of material fact as to substantial similarity." (App. C, 26).

Next, petitioners claim their songs are substantially similar to respondent's recordings. The District Court specifically found to the contrary. Petitioners do not suggest that this Court can overturn this factual finding.

The District Court's finding was based upon an application of the *Krofft* "extrinsic test" which can be used to establish the second of the prima facie elements of a copyright infringement claim — copying of a protectible expression. *Baxter*, *supra*. As stated in *Krofft*, the test

> is extrinsic because it depends not on the responses of the trier of fact, but on specific criteria which can be listed and analyzed. Such criteria include the type of artwork involved, the materials used, the subject matter, and the setting for the subject. Since it is an extrinsic test, analytic dissection and expert testimony are appropriate. Moreover, this question may often be decided as a matter of law.

Krofft, at 1164.

The District Court conducted precisely such an analytic dissection of the respective songs, and considered the expert testimony of both parties — even though it was not obligated to consider petitioners' inadmissible expert "letter." It found that the "only similarities between the works are that they are written in the same key and begin with the same tonic minor chord." (App. C, 25). The District Court further noted that these same similarities are found in many songs, including such diverse recordings as

> *You Lied to Me*, by Cathy Dennis, Shep Pettibone, and Tony Shimki (1992); *Keep Coming Back* by Richard Marx (1991); *Real Love*, by Jody Watley and Andra Cymore (1989); *Visions*, by Stevie Wonder (1973); and *Light My Fire*, by the Doors (1967).

(App. C, 20-21).

In sum, the District Court made a specific finding that petitioners could not establish the central point of their case. The Ninth Circuit affirmed this finding. This Court should not now consider overturning these factual findings.

Additionally, petitioner Bradford contends that the District Court should not have dismissed the Second Action on *res judicata* grounds. The District Court held that

> this is a paradignmatic (sic) case for res judicata and collateral estoppel, and both doctrines are clearly applicable. Bradford attempts in the instant suit to relitigate exactly the same claims and issues he raised as a party in the [First Action] . . .

(App. B, 6). On this issue, the Ninth Circuit agreed. "The district court properly concluded that Bradford's action was barred under the doctrines of claim preclusion and issue preclusion." (App. A, 5). Petitioners offer no reason why this Court should reexamine this issue.

Both the District Court and the Ninth Circuit correctly analyzed the factual basis of petitioners' claims, and applied the correct legal rules. Both courts concluded petitioners had no claims against respondents. There is no need for this Court to prolong this case, only to come to the same inevitable conclusion.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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